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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 200.

TRAYTON L. LATHROP,
Appellant,

VS.

JOSEPH D. DONOHUE,
Appellee.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

BRIEF FOR THE MISSOURI BAR, AMICUS CURIAE.

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THE INTEREST OF THE MISSOURI BAR IN THIS CASE.

The Missouri Bar is an Integrated Bar, established by rule of the Supreme Court of Missouri adopted June 16, 1944. Our bar is supervised by a Board of Governors whose members are elected by vote of all enrolled lawyers of the state. It is supported by compulsory annual fees

of those engaged in the practice of law in Missouri, and an attorney who is delinquent in the payment of his fees cannot continue the practice of law.[1]

The Appellant apparently challenges the constitutionality of any plan for the integration of a state bar, and argues that a charge of compulsory dues for the support of an integrated bar is likewise unconstitutional. His claim threatens the very existence of the Missouri Bar, and for that reason its Board of Governors has directed the filing of this brief *amicus curiae*. Consent of all parties has been obtained pursuant to paragraph 2 of Rule 42 of this court and is on file in the office of the Clerk.

We have been authorized to say that three other integrated bar organizations, the State Bar Association of Oklahoma,[2] the State Bar of South Dakota,[3] and the Mississippi State Bar,[4] are joining in this brief.

4. Established pursuant to Mississippi General Laws of 1932, Ch. 121.

SUMMARY OF THE ARGUMENT.

The legal profession in the United States has a governmental function, since lawyers have a role which is essential to the process of adjudication. The courts necessarily have the inherent power to regulate the bar; otherwise they would have responsibility without a corresponding authority over an agency instrumental in the discharge of that responsibility.

1. Rules 6 and 7 of the Supreme Court of Missouri, as amended, are set out in the Missouri Revised Statutes, 1949 and supplements, and in Vernon's Annotated Missouri Statutes.

2. Established by order of the Supreme Court of Oklahoma, 185 Okla. 505, 95 P.2d 113.

3. Established pursuant to South Dakota Code of 1939, 1960 Supp., Sec. 32.1118ff.

A state court might reasonably conclude that integration of its bar, consisting of the creation of a public body supported by dues of and subject to control by all lawyers, is an appropriate and desirable means for the exercise of its inherent power of regulation of the legal profession.

Integration of the Bar does not violate the Constitution. The only compulsion is in the payment of dues, which is supported by long-standing precedent. Integration neither compels nor forbids association, and does not purport to control speech at all. It serves proper governmental purposes. The appellant has failed to show any constitutional infirmity in the establishment of the State Bar of Wisconsin.

ARGUMENT.

POINT I.

By the tradition of American government the courts have relied upon the legal profession to aid them in the discharge of their responsibility for the administration of justice. The courts, therefore, must have the inherent power to regulate and to govern the legal profession.

The administration of justice is fundamental to all responsible government, at all times, everywhere. Government has to have the means for arbitrating private disputes, and for protecting society against its internal enemies. An enlightened society is concerned not only with the existence of the machinery for adjudication but also with the means for achieving correct solutions to disputes, with proper resolution of the facts and application of governing law, and also protection for the rights of those accused of crime.

In all American jurisdictions a consistent pattern for the adjudicative machinery has developed. It is not so important to trace the historical development of this pattern as it is to observe the end which has resulted with such consistency. Each of our states places the responsibility for the administration of justice upon a judicial hierarchy, separate from the law-making and law-enforcing branches of the government, and composed of trained lawyers on the bench working with trained lawyers at the bar.

The private practitioners composing our legal profession have a basic and important function in the administration of justice. The courts rely upon the attorneys practicing before them for the proper operation of the judicial process. In civil cases the judges normally delegate the responsibility for bringing out the facts entirely to the lawyers, and the lawyers also have an important function in informing the judges about the governing law. In criminal cases lawyers have an additional function—that of protecting the accused against improper deprivation of life or liberty. In the practice of their private calling, American lawyers actually perform a substantial governmental function.

The public aspects of the practice of law are nicely illustrated when we consider the power of courts to appoint counsel for indigent defendants. This court has held that no person may be convicted of a felony in the federal courts unless he has been offered counsel, if unable to engage his own,[4] and that state courts must furnish counsel to the accused in major cases.[5] But for this special

4. *Johnson* v. *Zerbst*, 304 U.S. 458.

5. See, for example, *Powell* v. *Alabama*, 287 U.S. 45 (capital case); *Uveges* v. *Pennsylvania*, 335 U.S. 437 (minor defendant charged with serious felony).

public character of the legal profession, it would seem that practitioners could claim that they would be deprived of liberty and property without due process of law if required to donate services for which they customarily charge.[6]

Without the partnership of public magistrates and private practitioners, our judicial system would necessarily be very different. The courts of civil law jurisdictions assume an active role in the development of the facts, and the function of civil lawyers appears to be of less importance than is the case in the United States.[7] We believe, however, that, aside from increased expense,[8] something is lost when a litigant is forced to place his primary reliance upon a public official rather than on his chosen individual counsel.

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6. A statute requiring such service without compensation has been held valid. *Brown* v. *Warren County*, 156 Iowa 20, 137 N.W. 474, 42 L.R.A. (N.S.) 527. In the absence of a statute or specific appropriation, it is quite generally held that a court has no means of compensating an attorney for services in representing an indigent defendant. *Baker* v. *State*, 84 Wis. 584, 54 N.W. 1003; *Application of Sullivan*, 297 N.Y. 190, 78 N.E.2d 467.

7. Burdick, William L., *The Bench and Bar of Other Lands* (1939).

p. 288:

> ". . . . France has no skillful cross-examiners for such advocates simply do not exist, no cross-examination of a witness by an advocate is permitted either in a civil or a criminal case,"

p. 413 (speaking of the German civil courts between the two world wars):

> ". . . . as in Civil Law countries generally, the president of the court examines the witnesses and takes charge of the case from beginning to end . . . ."

8. Civilian courts in major private cases normally consist of three judges. *Ibid.*

The reliance by the courts upon the legal profession in the discharge of their responsibilities has given rise to the maxim that lawyers are officers of the court,[9] and to the corollary that the courts have an inherent power to regulate the practice of law.[10] Without such power, the courts would have a responsibility without commensurate controls over the practitioners who have an essential role in the discharge of that responsibility. In a very real sense a court is no better than the lawyers at its bar.

The work of other professions and callings, important to the public that it may be, is not ordinarily a part of the governmental processes. The police power permits regulation of other professions and occupations in the public interest, but such regulation is a matter of legislative choice rather than of inherent power. Control over the practice of law is essential to the proper functioning of the judicial branch of the government. In this regard the legal profession is *sui generis* and stands in contrast to all others.[11]

A basic fallacy in the Appellant's approach is that he regards the legal profession purely as a private calling

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9. *Ex parte Garland*, 4 Wall. 333; *Theard* v. *United States*, 354 U.S. 278.

10. *Ex parte Burr*, 9 Wheat. 529.

11. The case-law of Missouri furnishes an excellent illustration. The case of *In re Richards*, 333 Mo. 907, 63 S.W.2d 672 (1933), holds that the specification of grounds for disbarment in a statute does not preclude a court in the exercise of its inherent power from disciplining or disbarring an attorney for causes not listed in the statute, if such causes appear sufficient to the court. Many cases are cited. In *State ex rel. Inscho* v. *Missouri Dental Board*, 339 Mo. 547, 98 S.W.2d 606 (1936), the court held that a dentist's license could not be revoked on grounds not listed in the governing statute, even though the conduct complained of was generally considered contrary to the ethics of the profession.

while overlooking its public aspect. He fails to see the reason behind the inherent power of regulation, as recognized and exerted by this court and by the highest courts of all states.

POINT II.

The highest court of a state might reasonably determine that integration of the bar is an appropriate means for the exercise of its inherent powers over the legal profession.

State courts in the exercise of their inherent powers over the legal profession are not confined to any particular plan or form of regulation. They are free to select any means of control which appears appropriate and which is consistent with the basic guarantees of the Constitution. This court will not substitute its judgment for that of the state courts on questions of the wisdom or desirability of a particular program of regulation.[12]

The plan of the State Bar of Wisconsin is typical of integrated bars generally and consists of: (1) the creation of a legal entity, or public corporation, to which all lawyers of the state belong, and in which they have the right to participate, and (2) the collection of compulsory dues from all lawyers for the support of the organization so created. The Wisconsin Supreme Court expressly holds that the State Bar of Wisconsin is a public and not a private agency, and cites with approval an annotation describing the integrated bar as a governmental body (R. 75).

Much has been written about how integration of the bar may be expected to improve the administration of

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12. One of the latest of the numerous cases so holding is *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483. The citations, l.c. 488, are particularly relevant.

justice.[13] Without attempting a complete catalog, we suggest that a state court might reasonably conclude that integration of the bar would be of material assistance in the following respects:

(a) As an aid to the court in the control and discipline of the legal profession, and in the suppression of the unauthorized practice of law.

(b) In improving the standard of learning of the legal profession, by working for improvement in the quality of the law schools, and by sponsoring programs for postgraduate legal education.

(c) By a program of educating the public as to the need for legal services and the dangers of handling legal matters without legal advice, thereby helping to eliminate the sources of legal disputes and to relieve the courts of the burden of deciding cases which should never be the subject of litigation.

(d) By encouraging the bar to assume responsibility for regulating and controlling itself, thereby relieving the courts of much of the detail work in the governance of the practice of law.

Progress toward the ends just described is not a matter simply for the benefit of lawyers. Improvement in the administration of justice is a matter of the highest public interest, of concern to every citizen. The very integrity of the state depends upon the maintenance of a sound judicial system. A state court which assumed an indiffer-

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13. The Appellant gives a representative list at pages xiv and xv of his brief. See also William Wicker, "Integrated Bars," 21 Tenn. L. Rev. 708; George E. Brand, "Bar Organization," 34 Jour. Am. Jud. Soc. 38 and "The Integrated Bar", 24 Ohio Bar Journal 591; James Willard Hurst, *The Growth of American Law; The Law Makers*, pp. 279, 288, 292, 365-366.

ent attitude toward progress in the areas just listed, or which left the matter to chance, would not be discharging its proper responsibilities in the judicial system. The courts might well consider, then, that integration of the bar is necessary to promote the general welfare.

The courts might conclude, furthermore, that the ends just described cannot be adequately advanced by voluntary associations. A voluntary association cannot collect dues from every lawyer, and its resources are therefore limited. If it relied on donations, one might fear that large donors would be able to exercise an undue influence in the affairs of the organization. Any action, expression, or opinion emanating from a voluntary association invites scrutiny of the personal interests of the members. The Wisconsin court at one time hoped that a voluntary bar association would be adequate,[14] but its experience was such that it decided to try integration. Its choice, based on experience, should not be lightly set aside.

The federal constitution permits a state to direct integration as a means for the governance of the bar. The aims of integration are proper, and the literature on the subject shows an expectation of substantial benefits. The Appellant is really attempting to convince this court that integration is unwise, and to get the court to translate his own opinions into constitutional principles. His approach is not new, and was effectively answered by Mr. Justice Douglas, as follows:[15]

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike

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14. *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500.

15. *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, l.c. 488.

down state laws * * *, because they may be unwise, improvident, or out of harmony with a particular school of thought.

POINT III.

Integration of the Bar does not deprive the appellant of any particular constitutional rights.

We would not argue for a minute that any of the supposed benefits of integration of the bar would permit its adoption, if it actually violated the constitutional rights of an individual. Both reason and authority demonstrate beyond troubling doubt, however, that bar integration does not deprive persons in the position of the appellant of any constitutional rights.

One of the strongest indications that there is no constitutional infirmity in integration of the bar is the existence of integrated bars in twenty-seven states. The substantially unanimous conclusion of some of our most distinguished appellate judges, sworn and devoted to the protection of constitutional rights, is highly persuasive of constitutional validity.[16]

All that the appellant is actually required to do, by reason of the rules establishing the State Bar of Wisconsin, is to pay an annual fee in order to continue in the practice of law. For years this court has sustained state laws which assess annual fees as a condition of engaging in particular occupations or professions.[17]

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16. See Annotations 114 A.L.R. 161 and 151 A.L.R. 617.

17. *Ficklen* v. *Taxing District*, 145 U.S. 1. In *Royall* v. *Virginia*, 121 U.S. 102, this Court assumed that an annual license fee for lawyers was valid. We consider the argument as to whether the practice of law is a "privilege" or a "right" to be a mere matter of semantics. It has always been held that the practice does not have to be opened to the general public but

Nor is a constitutional issue present simply because the annual dues collected from the lawyers are used for the support of the State Bar of Wisconsin.[18] Activities such as those detailed in the appendix to the opinion of the court below (R. 77-81), and those listed under our Second Point, are proper governmental activities which may be supported by public funds. They are designed for the welfare of the whole public—not of particular individuals. Since the regulation of the legal profession is a matter of expense, those who derive their livelihood from that profession may be required to contribute to that expense. The appellant is not entitled to recover a valid charge employed for a valid purpose. It would seem that the appellant has no standing to recover his enrollment fee unless he can show that the purposes for which it is used are wholly and totally unconstitutional, which they surely are not. Appellant, as a matter of fact, has produced nothing to show any substantial doubt about the constitutionality of any activity of the Wisconsin bar.

There is no validity to the appellant's argument that he has been deprived of freedom of association. The total

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may be limited by the courts to those showing themselves to be qualified professionally and morally; also that a lawyer may be deprived of his license to practice for professional misconduct or moral turpitude. In this sense the practice of law is a privilege. We agree that the privilege must be made available to all who show themselves qualified, on nondiscriminatory grounds, and that it may not be withdrawn except in accordance with due process of law.

18. This Court, as most courts, charges a fee as a condition of admission to practice before it. (Rule 52(f)). We assume that the proceeds are used for the purposes of the court, including the cost of printing briefs and records and travel expenses for counsel appointed by the court to represent indigent parties pursuant to Rule 53.

effect of constituting the State Bar of Wisconsin, and of establishing the appellant as a member is that he is given the opportunity to vote in bar elections and to take part in bar activities, if he cares to. Though this court's assumption of the validity of bar integration in the case of *Railway Employees Department, A. F. of L.*, v. *Hanson*, 351 U.S. 255, may be *dicta*, we think that the point is self-evident. Since the appellant is not obliged to associate with anybody, and may associate with anybody he cares to, there is simply no violation of his right to freedom of association.

Nor is there any infringement of freedom of speech. The appellant does not argue that he is prevented from saying anything, for he is not. He apparently asserts, first, that the voice of the majority of the bar is amplified by reason of integration, so that his dissenting views are muffled, and, second, that since the sentiment of the majority of the bar can be more readily determined, there will be pressure inducing conformity and discouraging dissent. Neither claim has constitutional significance. The court below might feel that in a voluntary association the more prominent, eloquent and successful attorneys would have the unduly strong voice, so that integration would make it easier for the ordinary members of the bar to speak, and would actually relieve against rather than increasing the pressure toward conformity. Such matters of opinion are to be decided by the courts having primary jurisdiction, as questions of judgment, and not by this court as a matter of rigid constitutional doctrine. There is no warrant for a finding that the dire results the appellant prophesies are an inevitable, or even probable, result of integration.

Running through the entire brief is a suggestion that there is constitutional infirmity because the State Bar of

Wisconsin engages in legislative activities. The opinion of the Wisconsin court shows that these activities are required to be limited to matters affecting the administration of justice, and that court states clearly that it will take action if the prescribed limits are exceeded (R. 73). Such limited legislative activities are a proper part of the governmental function of the integrated bar, which is a public body composed of persons having an active part in the processes of government.

The appellant is relegated to arguing that he considers integration unwise, or undesirable. That is the real burden of his brief. This should be addressed to the Supreme Court of Wisconsin alone and the views of that court should not be restricted by this court. The appellant should not prevail in his attempt to have this court substitute its opinions for those of the lower court in matters of judgment and discretion.

CONCLUSION.

If this court accepts jurisdiction, the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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